

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

5 C 754

In the Matter of

Petition by Kevin Gratt for  
Declaratory Ruling that  
47 C.F.R. § 64.1200(c)(3)  
is Invalid

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Federal Communications Commission  
Office of the Secretary

**PETITION FOR DECLARATORY RULING THAT  
47 C.F.R. § 64.1200(c)(3) IS INVALID**

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**PETITION FOR DECLARATORY RULING THAT  
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**INTRODUCTION**

Pursuant to the Administrative Procedure Act and the Rules of the Federal Communications Commission ("Commission" or "FCC"), which authorize the Commission to "issue a declaratory order to terminate a controversy or remove uncertainty," 5 U.S.C. § 554(e) and 47 C.F.R. § 1.2, Petitioner, Kevin Gratt, a resident of Bergen County, New Jersey, by his attorney, Todd C. Bank, respectfully petitions the Commission for a ruling declaring that 47 C.F.R. § 64.1200(c)(3) is invalid. The requested ruling would reinstate the clear language of the Telephone Consumer Protection Act, 47 U.S.C. § 227(hereinafter "TCPA"), which makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message," 47 U.S.C. § 227(b)(1)(B), which "advertise[s] the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission," 47 U.S.C. § 227(a)(4), whether or not the parties have an "established business relationship."

### DISCUSSION

**A. The "Established Business Relationship" Exemption, which Permits Prerecorded Telephone Calls that Contain Unsolicited Advertisements, Contradicts the Clear Statutory Language, which Prohibits the Commission from Exempting Such Calls**

Both the TCPA and the regulations enacted thereunder by the Commission state that it shall be unlawful to "[i]nitiate any *telephone call* to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by [FCC regulations]." 47 U.S.C. § 227(b)(1)(B), 47 C.F.R. § 64.1200(a)(2) (emphasis added). The regulation at issue states that "[t]he term '*telephone call*' in sec. 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller . . . to any person with whom the caller has an established business relationship at the time the call is made." 47 C.F.R. § 64.1200(c)(3) (emphasis added).<sup>1</sup> For the reasons discussed below, this regulation is invalid.

Title 47 U.S.C. § 227(b)(2)(B)(ii) states that the Commission may exempt "calls made for commercial purposes" from the aforementioned prohibition if those calls meet both of the following qualifications:

- (I) "will not adversely affect the privacy rights that this section is intended to protect"; and
- (I) "do not include the transmission of any *unsolicited advertisement*."

47 U.S.C. §§ 227(b)(2)(B)(ii)(I), (II) (emphasis added).

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An "established business relationship" is defined as "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential [telephone] subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential [telephone] subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(4).

The focus of this Petition is on the second criterion, which is that calls made for commercial purposes that are exempted by the Commission "do not include the transmission of any *unsolicited advertisement*." 47 U.S.C. § 227(b)(2)(B)(ii)(II) (emphasis added). Both the governing statute and regulations define the term "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person's prior express invitation or permission*." 47 U.S.C. § 227(a)(4), 47 C.F.R. § 64.1200(f)(5) (emphasis added). Thus, where an "established business relationship" exists, the exemption permits calls to recipients who have not given *prior express invitation or permission* to the callers to make such calls; that is, the exemption permits calls to be made that include "unsolicited advertisements," as that term is clearly defined by the statute and regulations. However, because the statute states that commercial calls permitted by any exemptions to the prohibition must "not include the transmission of any *unsolicited advertisement*," as noted above, and because the exemption in question permits precisely such calls, the exemption is invalid.

Lest there be any doubt that the Commission may not deem the mere existence of an "established business relationship" to be the equivalent of "prior express invitation or permission," the statute provides that the term "[live] telephone solicitation" does not include "a call or message . . . to any person with that person's prior express invitation or permission," 47 U.S.C. § 227(a)(3)(A), or "to any person with whom the caller has an established business relationship," 47 U.S.C. § 227(a)(3)(B).<sup>2</sup> Aside from the fact that common sense reveals that an "established business relationship" cannot be equated with "prior express invitation or permission," the fact that Congress

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The only part of the statute that employs the term "telephone solicitation" is subsection (c), which addresses live, as opposed to prerecorded, telephone calls.

included both terms separately shows that it, too, recognized that these terms are distinct. However, in formulating the “established business relationship” exemption, the Commission simply ignored this clear distinction:

Although the TCPA does not explicitly exempt prerecorded message calls from a party with whom the consumer has an established business relationship, it provides an exemption for commercial calls which do not adversely affect residential subscriber privacy interests and *do not include an unsolicited advertisement*. We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation *can be deemed* to be invited or permitted by a subscriber in light of the business relationship.

*In re Rules and Regulation Implementing the TCPA*, Docket No. 92-90 (F.C.C. October 16, 1992), ¶ 34 (emphases added). Whether or not the existence of an “established business relationship” renders prerecorded telephone solicitations invited or permitted in a colloquial sense can be debated; however, there can be no doubt that such a relationship cannot be equated with “*prior express* invitation or permission.” Whereas the statute clearly does not give the Commission the authority to exempt prerecorded telephone calls containing advertisements in the absence of the recipient’s *prior express* invitation or permission, the “established business relationship” exemption, on the other hand, allows such calls to be made where, at most, *implied* invitation or permission is arguably present (as the Commission’s use of the phrase “can be deemed” seems to recognize). The allowance of such calls is simply in flat contradiction of the statutory mandate concerning exemptions.



**B. The "Established Business Relationship" Exemption Concerning Facsimile Advertisements has Been Ruled Invalid for the Same Reasons that the Exemption at Issue is Invalid**

Like with the prohibition of prerecorded telephone calls, the TCPA likewise makes it unlawful to use "any telephone facsimile machine . . . to send an *unsolicited advertisement* to a telephone facsimile machine," 47 U.S.C. § 227(b)(1)(C) (emphasis added). Moreover, just like the "established business relationship" exemption concerning prerecorded telephone calls, the Commission has stated that an "established business relationship" exempts facsimile advertisers from the prohibition on unsolicited facsimile advertising. *See In re Rules and Regulation Implementing the TCPA*, Docket No. 92-90 (F.C.C. October 16, 1992), at ¶ 54 n.87. However, at least one court, employing the same analysis that this Petition employs, has held that the FCC was incorrect in exempting the facsimile prohibition based upon an "established business relationship."

The [FCC] has . . . suggested that when there is an established business relationship ("EBR") between the sender and the recipient, such a relation can give rise to an inference that permission to send a fax is implied from the relationship. *In re Rules and Regulation Implementing the TCPA*, Docket No. 92-90 (F.C.C. October 16, 1992), at ¶ 54 n.87. The Court gives great deference to the construction of a statute creating a regulatory scheme by the agency charged with administering such regulation, *e.g.*, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); however, "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employee Retirement System v. Betts*, 492 U.S. 158, 171 (1989). Here, the FCC's interpretation of the EBR defense would act to amend the TCPA's definition of unsolicited advertisement from a fax sent without the recipient's "prior express invitation or permission," to a fax sent without the recipient's prior express *or implied* invitation or permission. That interpretation conflicts with the plain language of the statute.

Moreover, Congress did expressly provide an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations, *see* 47 U.S.C. § 227(a)(3). "Where

Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted). With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to *express* invitations; the FCC’s interpretation would effectively delete that limitation from the statute. The Court cannot support an interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no “EBR” or “implied permission” exception to the definition of unsolicited advertisement for faxes.

*Kondos v. Lincoln Property Co.* (Dist. Ct. Dallas Co. July 12, 2001) (No. 00-08789-H), pages 4-5 (emphases in original) (a copy of the Order is annexed hereto as Exhibit “A”) <sup>3</sup>

In sum, the “established business relationship” exemption of 47 C.F.R. § 64.1200(c)(3) permits prerecorded telephone calls that contain unsolicited advertisements, and is thus “manifestly contrary” to the governing statute, *Chevron U. S. A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984), which states that exemptions to the prohibition on prerecorded telephone calls may not permit calls that contain unsolicited advertisements. Therefore, 47 C.F.R. § 64.1200(c)(3) is invalid.

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The Commission itself recognized that the applicable analysis of the exemption concerning prerecorded telephone calls and the exemption concerning facsimile advertisements are the same: in stating that “facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient,” *In re Rules and Regulation Implementing the TCPA*, Docket No. 92-90 (F.C.C. October 16, 1992), at ¶ 54 n.87, the Commission offered no explanation of that statement other than to cite paragraph 34 of that Order, as quoted above.

**CONCLUSION**

Based upon the foregoing, Petitioner, Kevin Gratt, respectfully requests that the Federal Communications Commission issue a ruling declaring that 47 C.F.R. § 64.1200(c)(3) is invalid.

Dated: Kew Gardens, New York  
April 28, 2003

Respectfully submitted,

Kevin Gratt

A handwritten signature in black ink, appearing to read "Todd C. Bank", written over a horizontal line.

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